75-369

Supreme Court, U. S.
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in the Supreme Court of the United States

OCTOBER TERM, 1974

NO. _____, MISC.

WILLIAM BUCOLO, RONALD SIMPSON and JAMES R. AGUT,
Petitioners,

vs.

JAMES ADKINS, CHIEF JUSTICE, JOSEPH BOYD, B. K. ROBERTS, BEN OVERTON and ARTHUR ENGLAND, JUSTICES OF THE SUPREME COURT OF FLORIDA, and DONALD P. KOHL, JUDGE OF THE PALM BEACH COUNTY, FLORIDA CIRCUIT COURT, CRIMINAL DIVISION,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS, AND BRIEF IN SUPPORT THEREOF

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vs.

JAMES ADKINS, CHIEF JUSTICE, JOSEPH BOYD, B. K. ROBERTS, BEN OVERTON and ARTHUR ENGLAND, JUSTICES OF THE SUPREME COURT OF FLORIDA, and DONALD P. KOHL, JUDGE OF THE PALM BEACH COUNTY, FLORIDA CIRCUIT COURT, CRIMINAL DIVISION,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Petitioners respectfully move this Court for leave to file the Petition for Writ of Mandamus hereto annexed;

and further move that an Order and Rule be entered and issued directing the Honorable Supreme Court of Florida, and the Honorable Chief Justice James Adkins, and the Honorable Justices Joseph Boyd, B. K. Roberts, Ben Overton and Arthur England, and the Honorable Palm Beach County, Florida Circuit Court, Criminal Division, and the Honorable Donald P. Kohl, Judge of the Palm Beach County, Florida, Circuit Court, Criminal Division, to show cause why a Writ of Mandamus should not be issued against them in accordance with the prayer of said Petition and why your Petitioners should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

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DATE — SEPT. _____, 1975.

PETITION FOR A WRIT OF MANDAMUS TO THE SUPREME COURT OF FLORIDA, AND THE HONORABLE CHIEF JUSTICE JAMES ADKINS AND JUSTICES JOSEPH BOYD, B. K. ROBERTS, BEN OVERTON AND ARTHUR ENGLAND OF THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUDGE DONALD P. KOHL OF THE PALM BEACH COUNTY, FLORIDA CIRCUIT COURT, CRIMINAL DIVISION, AND BRIEF IN SUPPORT THEREOF

Petitioners pray that a Writ of Mandamus issue to review the Judgment of the Supreme Court of Florida entered in the above entitled cause on July 9, 1975, and made "final" under said Court's rules upon expiration of time to file Petition for Rehearing on July 24, 1975, and the Mandate of said Court dated July 29, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Florida dated July 9, 1975 is reported at _____ So. 2d _____ and printed in the Appendix hereto.

The initial "corrected opinion" of the Supreme Court of Florida dated December 9, 1974 is reported at 303 So.2d 329 and the Order of the Supreme Court of the United States dated April 21, 1975 granting certiorari and reversing said Judgment is reported at 43 U.S. Law Week 3571. Both are printed in the Appendix hereto, along with the Supreme Court of Florida's Mandate to the Florida Circuit Court dated July 29, 1975.

JURISDICTION

The Judgment of the Florida Supreme Court was entered July 24, 1975, when the time expired to file rehearing petition under the Florida Rules (i.e., 15 days after the filing of the Opinion on July 9, 1975), and the Mandate thereon issued on July 29, 1975. This Court's jurisdiction is invoked under 28 U.S.C.A., Sec. 1651 on the ground that the Florida Supreme Court's Judgment and Mandate violate this Court's April 21, 1975 Order and Mandate in the case at bar.

QUESTION PRESENTED

Whether the Florida Supreme Court's reversal of the obscenity convictions below *accompanied by remand* "to the trial Court for further proceedings in which the standards established in *Miller v. California* can be applied" violates the Order and Mandate of the Supreme Court of the United States in the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . . "

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

STATUTE INVOLVED

Title 28, U.S.C.A., Section 1651 provides, in part:

> "(a) The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law . . ."

STATEMENT OF THE CASE

1. By "corrected opinion" dated December 9, 1974 the Florida Supreme Court affirmed Petitioners' convictions of violation of the Florida obscenity statute, Sec. 847.011, over Petitioners' attack on "the constitutionality of the statute vel non *and as applied to* both *the materials involved* and as applied to each of them" (303 So.2d 329 at 330, emphasis added, Appendix infra).

2. Petitioners' Petition for Writ of Certiorari to the Supreme Court of Florida (filed January, 1975, Case No. 74-857) again raised the same contentions along with a challenge to the extraordinary delay in decision below (over four years after oral argument before the Florida Supreme Court). The four allegedly obscene items, the Captain Cretin Comic Strip, the T.V. Comic-Strip, the Art Work Picture, and the Ink Blot Picture were printed in the Appendix to the Petition at pp. App. 24, 25, 26 and 27. (They were also attached to the Application for Stay granted by the Honorable Associate Justice Lewis F. Powell by Order dated January 6, 1975.) In addition, copies of the two issues of the 1968 *Florida Free Press* in which the four allegedly obscene items appeared were forwarded to this Court. Petitioners' Petition cited *Jenkins v.*

Georgia, 418 U.S. 153 (1974) and *Kois v. Wisconsin*, 408 U.S. 229 (1972), *inter alia*, in support of the proposition that "The Florida Obscenity Statute was unconstitutionally applied to the newspaper comic-strips and pictures involved." (Petition, pp. 16-19).

3. On April 21, 1975, this Court handed down the following Order:

> "74-857 Bucolo v. Florida. The petition for a writ of certiorari is granted and the judgment is reversed. Jenkins v. Georgia, 418 U.S. 157 (1974) and Kois v. Wisconsin, 408 U.S. 229 (1972)."

4. On July 9, 1975, the Florida Supreme Court handed down an opinion in which this cause was not simply reversed but ". . . remanded to the trial court for further proceedings in which the standards applied in *Miller v. California* can be applied". On July 29, 1975 the Court's Mandate to the trial Court to hold further proceedings in accordance with said opinion followed.

5. The relief sought herein is unavailable in any other Court as only this Court can enforce its Order of reversal and Mandate thereon so as to free Petitioners from the "further proceedings" ordered by the Florida Supreme Court and thus prevent a trial *de novo* on the issue of the criminal obscenity of items already held constitutionally protected by this Court's opinion in this cause.

REASONS FOR GRANTING THE WRIT

The clear import of this Court's reversal of the Judgments below, citing the *Jenkins* and *Kois* cases, is that the allegedly obscene items in question come within the protection of the First and Fourteenth Amendments as a matter of constitutional fact and law, cannot be prescribed as hardcore pornography, and cannot support Judgments of conviction.

The Florida Supreme Court's opinion below, incorporating its *Fontana v. State* opinion by reference (Appendix, infra), totally ignores the clear import of this Court's reversal. For the trial court below to hold "further proceedings in which the standards established in *Miller vs. California* can be applied" would subject Petitioners herein to a valueless second trial extremely prejudicial to them under all of the circumstances involved.

This Court has already held that Petitioners' convictions cannot stand under the Constitution since the items in question are constitutionally protected. Only this Court can prevent a second trial, contrary to this Court's Order and Mandate herein.

PRAYER

WHEREFORE, Petitioners pray:

1. That a Writ of Mandamus issue from this Court directed to the Honorable Supreme Court of Florida, and the Honorable Chief Justice James Adkins, and the Honorable Justices Joseph Boyd, B. K. Roberts, Ben Overton and Arthur England of the Supreme Court of Florida, and the Honorable Palm Beach County, Florida Circuit Court,

Criminal Division, and the Honorable Donald P. Kohl, Judge of the Palm Beach County, Florida Circuit Court, Criminal Division, to show cause on a day to be fixed by this Court why Mandamus should not issue from this Court directing said Justices and Judge to vacate and expunge from the record the Opinion of the Florida Supreme Court dated July 9, 1975 and the Mandate dated July 29, 1975, requiring further proceedings in which the standards established in *Miller v. California* can be applied.

2. That Petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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By _____
IRMA ROBBINS FEDER

APPENDIX

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the Circuit Court, Criminal Division, in and for Palm Beach County, Florida

WHEREAS, in that certain cause filed in this Court styled:

WILLIAM BUCOLO VS. STATE OF FLORIDA
RONALD A. SIMPSON VS. STATE OF FLORIDA
JAMES R. AGUT VS. STATE OF FLORIDA
WILLIAM BUCOLO and JAMES R. AGUT VS. STATE OF FLORIDA

Case No. 38,280, 38,279, 38,278, 38,424

Your Case No. 68M3538

The attached opinion was rendered on July 9, 1975,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable James C. Adkins Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 29th day of July, 1975.

/s/ Sid J. White

Clerk of the
Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA,
JULY TERM, A.D. 1975

CASE NO. 38,280
WILLIAM BUCOLO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 38,279
RONALD A. SIMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 38,278
JAMES R. AGUT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 38,424
WILLIAM BUCOLO and JAMES R. AGUT,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

CIRCUIT COURT CASE NO. 68M3538

Opinion filed July 9, 1975

Appeals from the Circuit Court, Criminal Division, in and for Palm Beach County, Donald P. Kohl, Judge

Richard Yale Feder; Irma Robbins Feder; Alfred I. Hopkins and Allan V. Everard, for Appellants

Earl Faircloth, Attorney General; and Raymond L. Marky, Assistant Attorney General, for Appellee

BOYD, J

These cases are before us pursuant to a mandate of the Supreme Court of the United States,[1] decided May 20, 1975, reversing a decision of this Court.[2]

In these consolidated appeals Appellants originally contested their convictions of violation of Section 847.011, Florida Statutes, commonly referred to as the Florida obscenity statute. The trial court having held that statute to be constitutional, Appellants challenged that ruling in their direct appeal to this Court; we upheld the judgment of the trial court based on our recent decision in *Papp v. State*,[3] *inter alia*, which had become final before the cases of *Hamling*[4] and *Jenkins*[5] were called to our attention.

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[1]Styled: William Bucolo, Ronald A. Simpson and James R. Agut v. Florida, Case No. 74-857.

[2]*Bucolo v. State*, 303 So.2d 329 (Fla. 1974).

[3]298 So.2d 413 (Fla. 1974).

[4]*Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

[5]*Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2751, 41 L.Ed.2d 642 (1974).

After this Court's decision *sub judice* was rendered, Appellants filed their petition for writ of certiorari with the United States Supreme Court, which granted the petition. Having considered this cause in light of *Jenkins*[6] and *Kois v. Wisconsin*,[7] that Court reversed this Court's holding and remanded the case for further proceedings.

Accordingly, in view of this Mandate and in light of our recent holding in *Fontana v. State*, Case No. 41,937, opinion filed July 9, 1975, this cause is reversed and remanded to the trial court for further proceedings in which the standards established in *Miller v. California*[8] can be applied.

It is so ordered.

ADKINS, C.J., ROBERTS, OVERTON and ENGLAND, JJ., Concur

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[6]Id.

[7]408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972).

[8]413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

IN THE SUPREME COURT OF FLORIDA,
JULY TERM, A.D. 1975

CASE NO. 41,937
Circuit Court Case No. 187311

JOSEPH GEORGE FONTANA and
DAVID M. CRICHTEN,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

Opinion filed July 9, 1975

An Appeal from the Circuit Court in and for Hillsborough County, I. C. Spoto, Judge

Joel Hirschhorn, for Appellants

Robert L. Shevin, Attorney General; and Raymond L. Marky, Assistant Attorney General, for Appellee

BOYD, J.

An information was filed against Appellants on March 18, 1970, and they were each convicted by a jury in the Magistrate's Court of Hillsborough County on six counts of violation of Section 847.011, Florida Statutes, in the sale of obscene magazines. Appellants were each fined $1,000.00 and sentenced to serve three months in the Hillsborough County jail. Appellants appealed to the Hillsborough County Circuit Court from an order deny-

ing both a motion in arrest of judgment and a motion for new trial. Thereafter, the Appellee moved to dismiss the appeal on several grounds, one of which was lack of jurisdiction because the trial court passed on the constitutionality of Section 847.011, Florida Statutes. The Hillsborough County Circuit Court denied the motion to dismiss on three grounds but treated the jurisdictional ground as a motion to transfer under Rule 2.1a(5)(d), Florida Appellate Rules; the court then granted the motion and transferred the cause to this Court.[1]

We recognize that the federal Supreme Court in *Hamling v. United States*[2] once again applied retrospectively the standards established in *Miller v. California*[3] to federal statutes, while in *Jenkins v. Georgia*,[4] that Court announced the rule that defendants whose convictions were on direct appeal at the time of the *Miller* decision should receive any benefit available to them thereunder, making no distinction between federal and state convictions for distributing obscenity.

The first *Miller* standard was initially enunciated in *Roth v. United States*[5] and was reaffirmed in the "Memoirs" opinion;[6] that standard is whether the average person, applying contemporary community standards, would find that, when taken as a whole, the magazines appeal to the prurient interest. The second standard of

[1]Article V, Section 3(b)(1), Florida Constitution.

[2]418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

[3]413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

[4]418 U.S. 153, 94 S.Ct. 2751, 41 L.Ed.2d 642 (1974).

[5]354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1959).

[6]*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966).

obscenity as required in *Miller* and previously established in "Memoirs" is whether the magazines depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or construed (in the instant case Section 847.011, Florida Statutes). The third and final standard established by *Miller* is whether the magazines, each taken as a whole, lack serious literary, artistic, political or scientific value. In passing, we note that *Miller* has rejected as a constitutional standard the "Memoirs" test of "*utterly* without redeeming social value."

Accordingly, in view of the recent opinions of the United States Supreme Court in *Hamling* and in *Jenkins*, *supra*, the judgment of the trial court is reversed and remanded for further proceedings in which the *Miller* standards, as reviewed briefly above, may be applied.

It is so ordered.

ADKINS, C.J., ROBERTS, McCAIN, OVERTON and ENGLAND, JJ., Concur

U.S. LAW WEEK, 43 L.W. 3571

(JOURNAL OF PROCEEDINGS
APRIL 21, 1975
ORDERS OF THE COURT . . .)

74-857. Bucolo v. Florida. The petition for a writ of certiorari is granted and the judgment is reversed. Jenkins v. Georgia, 418 U.S. 157 (1974) and Kois v. Wisconsin, 408 U.S. 229 (1972).

(CORRECTED OPINION OF DEC. 9, 1974)

CORRECTED COPY
IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1974
MONDAY, DECEMBER 9, 1974

CASE NO. 38,280
WILLIAM BUCOLO,

Appellant,

v.
STATE OF FLORIDA,

Appellee.

CASE NO. 38,279
RONALD A. SIMPSON,

Appellant,

v.
STATE OF FLORIDA,

Appellee.

CASE NO. 38,278
JAMES R. AGUT,

Appellant,

v.
STATE OF FLORIDA,

Appellee.

CASE NO. 38,424
WILLIAM BUCOLO and
JAMES R. AGUT,

Appellants,

v.
STATE OF FLORIDA,

Appellee.

CIRCUIT COURT CASE NO. 68 M 3538

Opinion filed October 16, 1974

Appeals from the Circuit Court, Criminal Division, in and for Palm Beach County, Donald P. Kohl, Judge

Richard Yale Feder; Irma Robbins Feder; Alfred I. Hopkins and Allan V. Everard, for Appellants

Earl Faircloth, Attorney General; and Raymond L. Marky, Assistant Attorney General, for Appellee

PER CURIAM.

In these consolidated appeals, appellants contest their convictions of violation of Section 847.011, Florida Statutes, commonly referred to as the Florida obscenity statute. Dispositive of our Court having jurisdiction was the trial judge's specific ruling upholding the constitutionality of that statute. We do. Article V, §3(b)(1), Florida Constitution.

Appellants attack the constitutionality of the statute vel non and as applied to both the materials involved and as applied to each of them.

The record is before us, as well as the appellate briefs,

Further
/Oral argument would serve no useful purpose, and therefore is hereby dispensed with.

After review of the record and briefs, and upon the construction, rationale and authority of (1) State of Flor-

ida v. Papp, Nos. 44,461 and 44,481, opinion filed June 12, 1974, with rehearing denied September 5, 1974; (2) State v. Reese, 222 So.2d 732 (Fla. 1969) and (3) Rhodes v. State, 283 So.2d 351 (Fla. 1973), the judgment of the trial court is hereby affirmed.

It is so ordered.

ADKINS, C.J., ROBERTS, McCAIN and DEKLE, JJ., Concur

ERVIN, J., Dissents